No. 98-262

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1998

PERRY JOHNSON, *et al.*,
Petitioners

v.

EVERITT HADDIX, *et al.*,
Respondents

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR *AMICI* STATES OF OHIO, ALASKA, ALABAMA, ARIZONA, CALIFORNIA, DELAWARE, DISTRICT OF COLUMBIA, FLORIDA, GEORGIA, HAWAII, IDAHO, ILLINOIS, INDIANA, IOWA, KANSAS, LOUISIANA, MARYLAND, MINNESOTA, MISSISSIPPI, MONTANA, NEBRASKA, NEVADA, NEW JERSEY, NEW YORK, NORTH CAROLINA, OKLAHOMA, OREGON, RHODE ISLAND, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, UTAH, VERMONT, WASHINGTON AND WEST VIRGINIA, THE COMMONWEALTHS OF MASSACHUSETTS, PENNSYLVANIA AND VIRGINIA AND THE TERRITORY OF GUAM IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

1. Whether, in litigation pending on the effective date of the Prison Litigation Reform Act ("PLRA"), the attorney fee provision of PLRA Sec. 803(d), 42 U.S.C. 1997e(d) applies to fees awarded after the Act's effective date for services rendered after that date?

2. Whether, in such litigation, this fee provision applies to fees awarded after the Act's effective date for services rendered before that date?

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STATEMENT OF *AMICI* INTEREST

The 39 *Amici* States support Michigan's efforts to obtain the full measure of relief afforded by 42 U.S.C. §1997e(d). That statute is a reasonably crafted compromise between the legitimate need to obtain legal representation for prisoners and the states' equally legitimate need to limit the cost and disruption that resulted from excessive fee awards under prior law. The *Amici* appear because the decisions below "prolong the life of ... a judicial construction of civil rights statutes that Congress" quite properly "found wanting". *Landgraf v. USI Film Products*, 511 U.S. 244, 259 (1994).

The most obvious result of unduly continuing prior law is the continuing diversion of resources to pay excessive awards. For example, the states of Michigan and California have paid more than $11,490,000 to prisoners' attorneys since April of 1996. While that amount is significant in its own right, its real impact becomes apparent when one considers how those funds could have been more productively used. That sum could have purchased one year of health care for 4,776 inmates or a year of supervision of 6,759 parolees. Criminal Justice Institute, Inc. *The Corrections Yearbook* 1997, 74, 160 (1997).[1]

An even more important result is the disruption caused to the day to day operation of correctional facilities. Litigation has very real, and very adverse, effects. At a minimum, it diverts staff from operational tasks to such matters as discovery, trial preparation and actual in court testimony. More importantly, it can undermine discipline and order:

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[1] The figure in the text was calculated by dividing the total paid by the average national daily cost for the services in question and dividing the resulting figure by 365.

Even if correctional officials are able to "win" the suits against them, leadership may be hurt when wardens are placed on trial. In the adversarial process, plaintiff and defendant--prisoner and warden--are legally and symbolically equal, a fact that does not go unnoticed by those whom the warden must supervise.

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An institution whose prisoners have successfully sued administrators may find its staff fearful of becoming defendants in another lawsuit and thus reluctant to exercise discretion to solve festering and potentially serious problems. The emotional costs of litigation for staff and inmates may increase tensions, with ensuing management and security problems.

G. Cole, R. Hanson, and J. Gilbert, *Alternative Dispute Resolution Mechanisms for Prisoner Grievances: A Reference Manual for Averting Litigation*, (National Institute of Corrections, U.S. Dept of Justice 1984) 6, 8 (footnotes omitted). Unfortunately, excessive fee awards under prior law provided incentives to unduly broaden and prolong prisoner cases, aggravating those problems.

Indeed, once a lawsuit interjects counsel into a prison they stay involved for inordinately long periods of time. For example, institutional reform litigation often develops a life of its own, as evidenced by the fact that some States are burdened by decrees entered more than a generation ago. *See Campbell v. McGruder*, Case No. 1462-71 (D.D.C. 1971) (decree pending for twenty-seven years); *Hines v. Anderson*, 439 F.Supp. 12 (D.Minn 1977) (decree pending for twenty-one years). Indeed, the cases at bar are well into their second decade.

Congress was aware of those problems and passed the Prison Litigation Reform Act, P.L. 104-134, 110 Stat. 321 ("PLRA"), to help States deal with them. It specifically sought to address the problems caused by excessive fee awards by including the provisions now codified in 1997e(d). 141 Cong. Rec. H1042 (daily ed. Feb. 1, 1995) (statement of Rep. Hoke); 141 Cong. Rec. H1480 (daily ed. Feb. 9, 1995) (Statement of Rep. Canady); 141 Cong. Rec. S14317 (daily ed. Sept. 29, 1995) (statement of Sen. Abraham) That statute addresses the problems described above by, *inter alia*, eliminating awards for services not necessary to vindicate federal rights and precluding disproportionate awards, thus eliminating financial incentives to improperly expand prison cases. Nonetheless, it still allows reasonable compensation for counsel who vindicate federal rights, authorizing such counsel to recover 150% of the hourly rate allowed under the Criminal Justice Act, 18 U.S.C. 3006A.

Unfortunately, the lower courts have been reluctant to give effect to that fair compromise. The States bear the costs. Consequently, the 39 *Amici* States strongly support Michigan's efforts to have § 1997e(d) applied according to its plain terms.

SUMMARY OF ARGUMENT

Landgraf v. USI Film Products, 511 U.S. 244 (1994), provides a two-step analysis for determining whether a statute applies to matters predating its enactment. Under that analysis "the court's first task is to determine whether Congress has expressly prescribed the statute's proper reach. If Congress has done so, there is no need" for further judicial analysis. *Id.* at 280. The second step, taken only if Congress has not set the temporal reach of a statute, is to determine whether applying the new law would have an improper retroactive effect. If so, the statute will not apply.

Both steps compel application of 42 U.S.C. § 1997e(d) to all post-enactment fee awards, regardless of when the underlying services were rendered. In addition, other precedent independently requires that fee requests for services rendered after § 1997e(d)'s enactment be controlled by that statute.

The plain language of § 1997e(d) clearly expresses Congress' intent that the statute apply to all post enactment fee requests, regardless of their chronology. It applies to requests made "in *any* action" concerning prisoners' rights and this Court has consistently held that such language "could not be broader," "does not hint of an exception," *Hutto v. Finney*, 437 U.S. 678, 694 (1978), and is an "unambiguous, direct, clear" direction that it should be applied "without qualification." *Ex parte Collette*, 337 U.S. 55, 58 (1949). Section 1997e(d) further provides that it should apply in all such cases whenever "brought," a backward looking verb that encompasses cases pending when the statute was enacted. Such "use of a verb tense is significant" and indicates that § 1997e(d) controls cases "brought" before enactment. *United States v. Wilson*, 503 U.S. 329, 333 (1992).

That is not overcome by the Sixth Circuit's negative inference based upon the fact that the matters eventually codified in § 1997e(a) were transferred from a section of the PLRA made expressly applicable to pending cases to another section not accompanied by such provisions. There are two reasons for that.

First, and of paramount importance, § 1997e(d) expressly provides that it is to be applied in "*any* action *brought*" by a prisoner, an "unambiguous directive" that the statute applies "without hint that some [cases] should be included." *Ex parte Collette*, 337 U.S. at 58. Therefore, it is highly improper to infer that any matters so clearly within the

scope of § 1997e(d) should be exempted because of something that was not in the statute. Indeed, the precedent the Sixth Circuit relied upon in drawing such an inference, *Lindh v. Murphy*, ___ U.S. ___, 117 S.Ct. 2059 (1997), recognized that the sort of language used in § 1997e(d) would qualify as "clear statement of retroactive effect" which should be given effect. *Id.* at 2064 n. 4 (citing the phrase "any civil action" as an example of an express provision for retroactive effect). That should have ended the matter.

Second, Congress had other reasons for changing the location of the provisions now codified in § 1997e(d) within the PLRA. Those reasons included the different nature of the matters covered by the different portions of the Act and the location of the matters now codified in § 1997e(d) within the appropriate chapter of the United States Code. More importantly, Congress likely assumed that there was no need to make extrastatutory provision regarding the applicability of § 1997e(d) to pending cases because the text of the statute itself expressed Congress' intention to control such cases. Such an explanation is further supported by the fact that the PLRA was passed shortly after *Landgraf* which indicated that it would be "uniquely" appropriate to apply statutes regulating attorneys' fees to pending cases, even absent express direction. 511 U.S. at 277.

In sum, § 1997e(d) contains the sort of unambiguous directions that require application under *Landgraf's* first step. Those clear expressions cannot be overcome by what is not in the statute. Therefore, the first phase of the *Landgraf* analysis should also have been the final phase.

However, *Landgraf's* second phase also supports application. Section 1997e(d) cannot be improperly retroactive because it does not regulate the parties' primary conduct. That primary conduct occurs inside "jail[s], prison[s] or other correctional facilit[ies]", § 1997e(d)(1),

and involves immediate, and often volatile, interactions between prisoners and with prison staff. It was not driven by the variables to be used in the fee calculations years later in a distant courthouse. Hence, it is unlikely that plaintiffs in such suits will be unfairly surprised by application of § 1997e(d).

Moreover, even if application of § 1997e(d) would upset their subjective expectations, it does not improperly "impair rights" for purposes of *Landgraf*. Section 1997e(d) regulates fee awards. Parties have no common law "right" to recover attorneys' fees and only an uncertain expectation of such a recovery under 42 U.S.C. § 1988 prior to receiving an actual award. Hence, § 1997e(d) cannot "impair rights" in such a manner as to have an improper retroactive effect under *Landgraf*.

Finally, the Sixth Circuit erred in holding that *Landgraf* precludes application of § 1997e(d) to requests for fees for services rendered after the statute's enactment. By its very terms, *Landgraf* is limited to situations involving "a federal statute enacted *after* the events in suit." *Id.* at 280 (emphasis added). Hence, application of § 1997e(d) fee requests based on post-enactment services cannot be precluded by *Landgraf*.

However, other precedent provides a rule of decision. This Court has consistently upheld the application of new statutes to post enactment matters arising in pre-enactment cases. Indeed, that approach has been followed in both civil and criminal cases. *Ex parte Collette*, 337 U.S. at 71; *McBurney v. Carson*, 99 U.S. 567, 569 (1878); *Dobbert v. Florida*, 432 U.S. 282, 292-293 (1977). There is no reason to depart from that settled practice here.

ARGUMENT

A. The Plain Language of § 1997e(d) Requires That It Be Applied to All Fee Requests Regardless of When the Underlying Services were Rendered

The most important part of any retroactivity analysis "is to determine whether Congress has expressly prescribed the statute's proper reach." *Landgraf*, 511 U.S. at 280. A review of the relevant portions of § 1997e(d) reveals that Congress provided the types of "unambiguous directives" and "express commands" described in *Landgraf* and *Lindh*, 117 S.Ct. at 2062-2063, indicating that the statute applies to all fee awards considered after its enactment, regardless of when the underlying services were rendered.

1. Congress' Direction That § 1997e(d) Apply "In *Any* Case *Brought* By a Prisoner" Makes It Expressly Applicable to All Post Enactment Fee Awards.

Section 1997e(d) clearly expressed Congress' intent to reach pending cases in two ways.

The first is the absolute and unqualified statement that § 1997e(d) applies "in *any* action brought by a prisoner," a broad statement without temporal limitation (emphasis added). On a general level, the term "any" indicates that Congress intended the statute to cover "all [cases], without restriction," *County of Chicot v. Lewis*, 103 U.S. 164, 167 (1881), requiring a "broader and more comprehensive coverage" than applied below. *United States v. Rosenwasser*, 323 U.S. 360, 362-363 (1945). Of more particular interest, the Court has recognized that the almost identical phrase "any civil action" is an "unambiguous, direct, clear" indication that

a statute is intended to apply "without qualification, without hint that some [cases] should be excluded," *Ex parte Collett*, 337 U.S. 55, 58 (1949). See also *Hutto v. Finney*, 437 U.S. 678, 694 (1978) ("The act itself could not be broader. It applies to 'any' action brought to enforce certain civil rights laws. It contains no hint of an exception..."); *N.A.A.C.P. v. New York*, 413 U.S. 345, 355-356 (1973). Bringing the matter to the sharpest possible focus, *Lindh* strongly suggests that such a phrase would "qualify as a clear statement of retroactive effect." 117 S. Ct. at 2064 n.4 (highlighting the phrase "any civil action" set forth in 28 U.S.C. § 1346(a)(1)).

That is reinforced by § 1997e(d)'s second "express command," the statement that it apply to all actions "brought" by a prisoner. That term is used generally, and in § 1997e(d), as the past tense of the word "bring." *Black's Law Dictionary*, 194 (6th Ed. 1990) ("past tense of 'bring'. *See* bring suit, *supra*"). Congress' choice of that backward-looking verb to describe the statute's coverage plainly indicates that it intended § 1997e(d) to control awards in cases that were "brought" before it was enacted. Indeed, that indicator is particularly compelling because Congress phrased other, more substantive portions of § 1997e(a) in prospective terms. See §§ 1997e(a) ("No action *shall be* brought . . ." until administrative remedies are exhausted) and 1997e(e) (No action "may *be* brought" to recover certain types of damages) (emphasis added). As this Court has noted, "Congress' use of a verb tense is significant in construing statutes." *United States v. Wilson*, 503 U.S. 329, 333 (1992). In this case, it clearly expressed Congress' intent to control pending cases.

In sum, the "unambiguous, direct, clear" directive that § 1997e(d) control "*any* case *brought*" makes "congressional intent clear" and, hence, "it governs." *Kaiser Aluminum & Chemical Corp. v. Bonjorno*, 494 U.S. 827, 837 (1990).

2. Neither the History nor the Structure of the PLRA Justify Any Other Result.

The Court below relied upon *Lindh* and the facts that Congress expressly made § 802 of the PLRA applicable to pending cases and that § 1997e(d) was moved from that section to PLRA § 803, which was not accompanied by such provisions, to infer that Congress did not intend § 1997e(d) to control pending cases. That analysis is flawed on two levels.

First, and most importantly, Congress has clearly spoken on the temporal reach of § 1997e(d) and an "implication based upon what is not in the statute is weakest when it suggests results strangely at odds with other textual indications." *Field v. Mans*, 516 U.S. 59, 75 (1995). As just explained, Congress clearly mandated that the statute apply "to *any* action *brought* by a prisoner." Indeed, *Lindh* itself cited the very similarly phrased language of 28 U.S.C. § 1346 (a)(1) as an example of the type of language that would clearly require retroactive application. 117 S. Ct. at 2064 n.4. When Congress has plainly spoken the first, and last, act of judicial construction is to apply the statute according to its terms. No implication can be made as "it would be dangerous in the extreme to infer that a case for which the words of [a statute] expressly provides shall be exempted from its operation." *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 254 (1992) (quoting *Sturges v. Crowninshield*, 4 Wheat 122, 202 (1819)).

Second, unlike the legislation construed in *Lindh*, Congress had reasons for the way it structured the PLRA that are unrelated to the temporal reach of § 1997e(d). There were at least three such reasons.

a. *Lindh* based its negative inference on the fact that the two parts of the act at issue were so closely related that it

was very likely that in choosing different language Congress chose different results. *Lindh*, 117 S.Ct. at 2065. However, when statutes are less closely related, such a negative inference is less strong, especially when other textual pointers suggest a different result. *Field*, 516 U.S. at 75. Although the provisions contained in PLRA §§ 802 and 803 have partially overlapping purposes, they further them in completely different manners and therefore lack the close relationship underlying the *Lindh* implication.

PLRA § 802 amended 18 U.S.C. § 3626 to limit the substantive relief available in prisoner cases, affecting the immediate, primary conduct of the litigants behind prison walls. In contrast, § 1997e(d) affects their procedural interests long after the outcome of their primary dispute has been resolved. Because of the disparate nature of those two statutes, the close relationship underlying *Lindh* is absent and a *Lindh* type inference is inapposite.

b. A second reason is the structure of the United States Code. The general subject of civil rights and the specific subtopics of attorneys' fees and the rights of the institutionalized are controlled by Title 42. See 42 U.S.C. §§ 1981-1997j, inclusive. The PLRA's amendments to those statutes were set forth in § 803 while § 802 dealt exclusively with amendments to Title 18. Moving the provisions now codified in § 1997e(d) to § 803 is not inextricably linked to a desire to limit their temporal reach, but instead can be explained by the fact that placement there in consistent with the structure of the Code.

c. Finally, and most importantly, the plain language of the provisions codified § 1997e(d) made it unnecessary to include them in the section of the PLRA made expressly applicable to pending cases. The unqualified mandate that § 1997e(d) control "any" case, whenever "brought," clearly made it applicable to pending cases. Given that language, it

was perfectly logical for Congress to assume that the statute would apply to pending cases, even if it was moved from § 802 to § 803.

Indeed, such an assumption is strengthened by the fact that Congress drafted the PLRA in the shadow of *Landgraf*, which held that it is "uniquely" appropriate for new attorney fee statutes to apply in pending cases, even without an express command. *Landgraf*, 511 U.S. at 277. *Landgraf* also indicated that a statute could be applied to pending cases based on its text alone, without a separate temporality provision in the underlying legislative act. *Id.* at 257-263, 273. See also, *Madrid v. Gomez*, 150 F.3d 1030, 1036 (9th Cir. 1998). Indeed, *Landgraf* expressly approved of such an approach, as exemplified in *United States v. Schooner Peggy*, 5 U.S. 103 (1801), as "simply a response to the language of the statute." 511 U.S. at 273. As this Court has noted, Congress is presumed to legislate with this Court's retroactivity precedents in mind. *Id.* at 261; *Lindh*, 117 S.Ct. at 2064. Hence, Congress likely thought that § 1997e(d) was independently applicable to pending cases and that there was therefore no need to make other provisions regarding its temporal scope.

B. Applying § 1997e(d) To All Post Enactment Fee Requests Would Not Have An Improper Retroactive Effect Regardless of When the Underlying Services Were Rendered.

Although Congress' clearly expressed intention is sufficient to settle the matter, application of § 1997e(d) is independently justified because it would not have the type of retroactive effect forbidden by *Landgraf*. On a fundamental level, the statute regulates matters that are so far removed from the parties' primary conduct that it cannot be impermissibly retroactive. Furthermore, this Court's

teachings on attorney's fees make it clear that litigants have no more than a subjective expectation of recovering any particular fee prior to its actual award, not the type of "right" sufficient to support a finding of improper retroactive effect under *Landgraf*. Those unavoidable realities justify application of § 1997e(d), regardless of when the underlying services were rendered.

1. Section 1997e(d) Does Not Regulate Primary Conduct.

The touchstone for determining if a statute has an improper retroactive effect is whether it unfairly changes the substantive legality of the parties' pre-enactment "primary conduct," the conduct at issue in the underlying lawsuit. If the statute would change that substantive legality after the fact, it is improperly retroactive. If the statute merely changes the procedure for determining that substantive legality, application is permissible because parties have a diminished reliance interest in such procedure. *Landgraf*, 511 U.S. at 275.

More than a century of precedent establishes a sharp distinction between parties' primary conduct and the separate issue of how their attorneys will be paid. The subject was initially treated as so unrelated to the substantive rights litigated in federal courts that it was left to local discretion. *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240, 247-257 (1975). In 1881, the Court observed that a controversy over fees "though incidental to the cause . . . was a collateral one, having a distinct and independent character" from the dispute giving rise to a lawsuit. *Trustees v. Greenough*, 105 U.S. 527, 531 (1881). Hence, fee disputes were "regarded as so far independent" from the underlying cause of action as to be treated as a separate piece of litigation. *Id.* at 531. In 1939, this Court restated those

conclusions and added that fee controversies are "independent proceedings supplemental to the original" lawsuit. *Sprague v. Ticonic Nat'l Bank*, 307 U.S. 161, 169, 170 (1939).

More recently, it has been observed that a "court's decisions of entitlement to fees will therefore require an inquiry *separate from the decision on the merits*" and that an award of fees cannot be "fairly characterized as an element of relief" on the merits. *White v. New Hampshire Dept. of Employment Security*, 455 U.S. 445, 451-452 (1982) (emphasis added). Most tellingly, this Court has expressly relied upon that distinction to apply new fee statutes to pending cases, noting that "no increased burden was imposed since [the new statute] did not alter the [parties'] constitutional responsibility." *Bradley v. Richmond Sch. Bd.*, 416 U.S. 696, 721 (1974).

The relationship between § 1997e(d) and the substantive matters underlying the cases it controls are just as separate. Those cases arise from disputes behind prison walls between prisoners and prison administrators. Prisoners, who are "mostly uneducated and indeed largely illiterate," *Lewis v. Casey*, 518 U.S. 343, 354 (1996), probably did not give much thought to such abstract concepts as proportionality and market rates in their interactions with corrections staff. They are concerned about more immediate matters as "[w]hat for a private citizen would be a dispute with his landlord, with his employer, with his tailor, with his neighbor, or with his banker, becomes, for the prisoner, a dispute with the State." *Preiser v. Rodriguez*, 411 U.S. 475, 492 (1973). Similarly, it is doubtful that "prison officials, on the spot and with the responsibility for the safety of inmates and staff," *Wolff v. McDonell*, 418 U.S. 539, 566 (1974), contemplated the fine points of lodestar calculations when meeting the intensely practical, and often violent, challenges giving rise to prisoner suits.

Given the nature of such disputes and the more pressing matters competing for the participants' attention, it is unlikely that parties based their actions, the "primary conduct" at issue in cases controlled by § 1997e(d), on the applicability of that statute. Therefore, applying that statute to their cases simply cannot have the type of unfair effect prohibited by *Landgraf*.

2. Parties Do Not Have "Rights" That Can Be "Impaired" by § 1997e(d).

Landgraf teaches that application of a statute is improperly retroactive if it would "impair rights." *Id.* at 280. Of crucial importance, it also makes clear that subjective expectations do not rise to the level of "rights" and that such expectations can be retrospectively "upset" without offending retroactivity principles:

> Even uncontroversially prospective statutes may unsettle expectations and impose burdens on past conduct: a new property tax or zoning regulation may upset the reasonable expectations that prompted those affected to acquire property; a new law banning gambling harms the person who had begun to construct a casino before the law's enactment or spent his life learning to count cards. If every time a man relied on existing law in arranging his affairs, he were made secure against any change in legal rules, the whole body of our law would be ossified forever.

Id. at 270 n. 24 (citations and internal punctuation omitted). A party has no more than an unprotected, subjective expectation of recovering any particular fee prior to that fee being awarded. Hence, applying § 1997e(d) to fee requests is

not improperly retroactive, regardless of when the services giving rise to those requests were rendered.

It is well settled that parties have no common law right to recover their attorney's fees from opposing parties. *Alyeska Pipeline Service Co. v. Wilderness Soc'y*, 421 U.S. 240 (1975). Although Congress partially filled that void by making recovery of fees mandatory under some statutes, it did not mandate such a recovery under 42 U.S.C. § 1988. *Id.* at 261-262. Instead, it made any award discretionary. n.34; H. Rep. 1558, 94th Cong., 2d. Sess. (1976) 3, 5, 8. Consequently, "§ 1988 does not guarantee that lawyers will recover fees..." *Kentucky v. Graham*, 473 U.S. 159, 168 (1985). Instead, counsel may not recover fees unless they meet their burden of proving that an award is appropriate, a burden that some have suggested may only be met with clear and convincing evidence. *Hensley v. Eckerhart*, 461 U.S. 424, 441 (1983) (Burger, C.J., concurring).

Moreover, "[C]ongress does not authorize an award of fees whenever it was reasonable for a plaintiff to bring a lawsuit or whenever conscientious counsel tried the case with devotion and skill." *Id.* at 436. Some final, enforceable relief on the merits must be obtained. Interlocutory triumphs and other successes, no matter how impressive, are not sufficient to make a litigant eligible to recover fees as a "prevailing party." *Hanrahan v. Hampton*, 446 U.S. 754, 757-758 (1981); *Kentucky v. Graham, supra*. Once that threshold has been crossed, a significant degree of success must be shown as the fact "that a plaintiff is the prevailing party may say little about whether the expenditure of counsel's time was reasonable in relation to the success achieved." *Hensley*, 461 U.S. at 436. See also *Farrar v. Hobby*, 506 U.S. 103, 115 (1992). Finally, even if those criteria are met, expectations of fees may be dashed by subsequent developments having nothing to do with the case itself. *Rhodes v. Stewart*, 488 U.S. 1 (1988); *Hewitt v. Helms*, 482 U.S. 755 (1987).

In sum, plaintiffs have nothing more than a subjective expectation that they will recover any particular fee prior to actually receiving an award under § 1988. They certainly do not have a "right" that could be improperly "impaired" for purposes of *Landgraf*. Hence, applying § 1997e(d) to all awards made after the enactment of the statute would not offend retroactivity principles.

C. Application of § 1997e(d) to Fees for Post Enactment Services is Required Without Regard to *Landgraf*.

Although the *Amici* submit that application of § 1997e(d) is consistent with *Landgraf* regardless of when the services giving rise to the fees were rendered, a different analysis independently supports that result with regard to fees for services rendered after enactment.

Initially, it must be noted that the Sixth Circuit erred in holding that *Landgraf* precludes application of § 1997e(d) to requests for fees for *post*-enactment services. *Landgraf* only controls if the statute at issue changes the consequences of conduct that *preceded* enactment. It applies only "when a case implicates a federal statute enacted *after* the events in suit." *Id.* at 280 (emphasis added). Hence, application of § 1997e(d) to fee requests for post-enactment services cannot possibly be precluded by *Landgraf*.

More importantly, application of § 1997e(d) to such requests is supported by a stream of precedent that is both wide and deep. Once source flows from this Court's civil jurisprudence. For more than 120 years, this Court has upheld application of statutes passed after the initiation of suit to post filing, post-enactment matters covered by their terms. *Ex parte Collette*, 337 U.S. 55, 71 (1949); *McBurney v. Carson*, 99 U.S. 567, 569 (1878). The other source springs

from criminal cases, where, as summarized in *Dobbert v. Florida*, 432 U.S. 282, 292-293 (1977), the Court has consistently upheld the application of new rules or statutes in pending cases, even when those changes would disadvantage the criminal defendant.

There is no reason to depart from that pattern here. There can be no claim of unfair surprise because the fee limitations of the PLRA were widely known prior to passage of the Act. Kirk Victor and Peter Stone, *From the K Street Corridor*, The National Journal, Jan. 13, 1996, at 76; John Dunne, *Unconscionable Limits on Prisoner Lawsuits*, The Washington Post, Nov. 8, 1995, at A17. Moreover, once § 1997e(d) was enacted prisoners' counsel were on notice of its terms because, like all persons, they are presumed to know the law. Most importantly, appropriate compensation of counsel in federal cases is within the sound discretion of Congress and this Court has been reluctant to find reason to depart from fee provisions that are far more parsimonious than § 1997e(d). *Pierce v. Underwood*, 487 U.S. 552, 572 (1988). Hence, counsel seeking to recover fees for services rendered after § 1997e(d)'s enactment can claim neither procedural surprise nor substantive hardship. Therefore, there is no reason to depart from this Court's settled precedents.

CONCLUSION

For the foregoing reasons, the 39 *Amici* States urge the Court to reverse the decisions below and hold that 42 U.S.C. § 1997e(d) controls all requests for attorney's fees considered after its enactment, regardless of when the services giving rise to those requests were rendered.

Respectfully submitted,

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